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No. 428

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Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC. and JACK O. GROSS, *Petitioners*,

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals (A. 184) is reported at 378 F.2d 118. The memorandum opinion and order of the Federal Communications Commission (A. 146) is reported at 4 F.C.C.2d 612.[1]

[1] The original memorandum opinion and order inadvertently omitted a number of lines supplied the following day by an erratum (A. 176). In the memorandum opinion and order reprinted in the sep-

JURISDICTION

The judgment of Court of Appeals was entered on April 28, 1967 (A. 194). The petition for writ of certiorari was filed on July 27, 1967, and granted on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1964) and 28 U.S.C.A. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority under the Communications Act of 1934 to adopt rules regulating directly certain aspects of the operations of community antenna television (CATV) systems.

2. Whether such authority encompasses procedures designed to preserve the status quo pending the Commission's evidentiary hearing to determine whether the importation by CATV systems of television station signals from one area into another would jeopardize local television broadcast service and hence be contrary to the public interest.

STATUTES AND RULES INVOLVED

Sections 1, 2(a), 3(b), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b) and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S. §§ 151, 152(a), 153(b), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) (1964), and sections 74.1103, 74.1105, 74.1107 and 74.1109 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1103, 74.1105, 74.1107, 74.1109 (1967), are set forth in the appendix of the Brief for the United States and the Federal Communications Commission in No. 363, companion to the present case.

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arate appendix, these lines (nos. 10-21 at A. 167) have been inserted for convenient reading. All citations designated "A." refer to the decisions and orders of the Court of Appeals and the Commission reprinted in the separate appendix filed in this Court.

STATEMENT

This case deals with the authority of the Federal Communications Commission to regulate the transmission of the signals of television stations by community antenna television systems to prevent frustration of national policies intended to maximize the availability of free off-the-air local television broadcast service for all Americans.

A. *Television and CATV*

The Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), which establishes the basic structure of American television, seeks to provide "all the people of the United States a rapid, efficient, Nation-wide . . . wire and radio communication service" and to furnish each of the several states and communities with a "fair, efficient, and equitable distribution" of service. Sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964). To further these purposes it directs the Federal Communications Commission to distribute "licenses, frequencies, hours of operation, and of power" and authorizes it to establish "areas or zones to be served by any station." Sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964).

In performing these statutory responsibilities the Commission has sought to develop a national television structure based upon a large number of local broadcasting stations throughout the country rather than a handful of superstations in huge metropolitan centers. This structure is principally designed (1) to give at least some off-the-air service to as many Americans as possible, (2) to maximize the number of communities with local or area outlets of self-expression and (3) to provide multiple program choices off the air for the largest possible number of people—all without regard to ability to pay.[2] See Sixth Report and Order, 1

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[2] Local television stations present programs addressed to local and area concerns and programming of regional or national interest. National programming is obtained through one of the major commercial

P & F Radio Reg. 91:601, 17 Fed. Reg. 3905 (1952). Basic to this structure is a "table of assignments" of television channels, first adopted by the Commission in 1952 and since then continually revised, 47 C.F.R. § 73.606(b) (1967), which allots available channels to communities throughout the United States and designates them for use by commercial or noncommercial educational stations.[3] Also basic to this scheme are Commission rules governing station tower height and power which effectively limit the general area to be served by each station, 47 C.F.R. §§ 73.614, 73.689 (1967), thereby creating a pattern of existing and potential stations shaped to attain statutory ends.

In addition to these technical standards and requirements, the Commission has adopted rules to foster diversity and prevent concentration of control of television broadcast stations and to limit sharply the use of multiple transmitting facilities for extending the reach of a station. These regulations include the Commission's multiple ownership rules and rules limiting concentration of ownership in neighboring markets which have long controlled the number and location of television stations which any single entity may own or control and the extent to which the signals of its stations may be extended. 47 C.F.R. § 73.636 (1967). Also restricting the extension of the signals of particular stations are the rules and policies limiting operations of auxiliary television transmitting stations. *Id.* and 47 C.F.R. §§ 74.731-32, 74.831-32 (1967).

This national television structure is bottomed on the use of both the 12 very high frequency (VHF) channels and the 70 ultra high frequency (UHF) channels available for tele-

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or educational television networks (if the local station is network affiliated) and by all stations from other kinds of national suppliers.

[3]The Commission's table of assignments has been sustained by the courts. Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); Peoples Broadcasting Corp. v. United States, 209 F.2d 286 (D.C. Cir. 1953).

vision broadcasting. No significant increase in the number of television stations, especially to provide additional choice of service in areas that already have television stations, is possible on the 12 VHF channels without causing intolerable interference to television reception. Accordingly, expanded use of UHF channels is imperative for a full pattern of free off-the-air television service provided by local and area television broadcast stations. UHF channels are also vital to foster noncommercial educational television development since most channels reserved for such use are UHF. 47 C.F.R. § 73.606(b) (1967). However, until recently most of the UHF assignments have remained unused,[4] primarily because the great bulk of television sets were not equipped to receive UHF broadcasts.[5]

To meet the threshold obstacle to UHF development the Congress in 1962 enacted the all-channel receiver law, pursuant to which all television receivers purchased after April 30, 1964, must be equipped to receive UHF as well as VHF broadcasts.[6] That statute reflects not only the Congress' concern that the policies of the Communications Act of maxi-

[4] As late as December 1964, 82 percent of allocated commercial VHF channels were activated and only 7 percent of the commercial UHF complement. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry 10 (Report to the FCC 1965). See Note, 75 Harv. L. Rev. 1578 (1962).

[5] By 1962, only 9 million or 16 percent of the 55 million sets owned by the public could receive UHF. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The result was a "vicious circle": "Unless the public has sets that can receive UHF as well as VHF, prospective UHF stations will not be able to reach the audiences necessary for effective operation and UHF stations will be deterred from coming into being. Yet, without UHF stations in operation, the public lacks the incentive to buy sets capable of receiving both UHF and VHF." *Id.* at 5.

[6] 76 Stat. 150, adding 47 U.S.C. §§ 303(s), 330 (1964). See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2-6 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 2-5 (1962).

mum development of local broadcast outlets were not being implemented but also its recognition that those policies could be accomplished only through full use of UHF as well as VHF. The Congress realized that expansion of UHF television would not take place overnight. Indeed, its interest was in the long-range development of a full pattern of nationwide television broadcast service. Thus, it sought to provide the foundation for local broadcasting through an ever increasing audience of viewers to make it possible for new UHF stations to come on the air and to sustain their healthy operations.[7] The initial success of this effort is reflected in the growing number of UHF stations, both commercial and noncommercial, which has nearly doubled in the period since the statute and increased by three dozen stations in the past year alone.[8]

The evolving structure of local television broadcasting has been increasingly threatened by a new form of CATV, whose very purpose is to extend the range of television signals beyond the bounds fixed by the Commission. CATV systems operate by collecting, usually through a master antenna located at high elevation, television signals directly from originating stations or via microwave radio relays, that distance or other natural conditions would prevent television sets from receiving adequately or at all in the CATV-served com-

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[7]Public Broadcasting Act of 1967, P.L. 90-129, and Educational Television Facilities Act of 1962, 76 Stat. 64, in aid of noncommercial television further affirmed the Congress' reliance on local television. See H.R. Rep. No. 999, 87th Cong., 1st Sess. 13 (1961); H.R. Rep. No. 572, 90th Cong., 1st Sess. 18 (1967); S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967).

[8]TV Digest, Television Factbook No. 37, at 52-a (1967) reports that as of January 1 of each year the number of UHF stations on the air was 91 in 1961 and 174 in 1967. As of December 1967, 210 UHF stations were operating, 209 new UHF permittees had been authorized and 96 applications for additional UHF stations were pending. TV Digest, Weekly TV Addenda to Television Factbook No. 37, Dec. 11, 1967, p. 1.

munity. The signal is then amplified and transmitted to and throughout the community by means of coaxial cable and further amplified and carried into each individual home through a wire hooked directly into the television set. See 47 C.F.R. § 74.1101(a) (1967). For this service provided by "complex, extensive and expensive instrumentation," p. 24 *infra*, the subscriber is charged a continuing monthly payment and normally an installation fee.

During CATV's early period, practically all systems confined themselves to the supplementary function of providing television service, usually up to three to five channels, to small and isolated communities with little or no off-the-air service. Corry, Community Antenna Television: An Economic Survey 2-3 (Cong. Leg. Ref. Serv. 1965). In recent years the focus of CATV has begun to change radically. When the Commission asserted the regulatory authority challenged below, CATV was increasingly attempting to move into places with multiple local television service, and where new UHF stations had recently begun service or could be expected to do so in the reasonably near future (A. 15, 48). Moreover, they were seeking to import signals from centers like Los Angeles, New York and Chicago not normally received off the air (A. 48). Signals were being transported increasing distances (A. 48). Twelve channels were becoming commonplace among new systems and systems of twenty channels and more were under development (A. 47).

By the end of 1965, shortly before the Commission acted to regulate CATV directly, over 1500 CATV systems (mostly of a traditional nature) were already in operation but in addition nearly 3000 local CATV franchises had been obtained or were being sought (A. 47). With its high rate of profit, the industry had started to attract multi-system operators and giant corporations.[9] Given CATV's ability

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[9]Corry, Community Antenna Television: An Economic Survey 9-13 (Cong. Leg. Ref. Serv. 1965); Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcast-

to penetrate the television markets in which most Americans reside, CATV's own estimates of its potential ranged so high as to predict CATV systems in "almost all American cities—small and large" and CATV linkages with "85 percent of all television sets in the United States" within the next decade (A. 49). And with FCC regulation imminent, CATV entrepreneurs were rushing to activate their systems in the hope of obtaining grandfather rights (A. 102-03), despite clear warnings from the FCC that "CATV operations may be subject to regulation." Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 472, 477 (1965).

B. *The CATV Rules*

Faced with the growing danger to basic regulatory policies, which unrestricted CATV would circumvent, and to the local station's economic structure, which unrestricted CATV would undermine, the Commission found itself compelled to assert rulemaking authority over CATV operations. In April 1965 the Commission first adopted rules with respect to CATV systems using radio microwave facilities. These rules required CATV systems to carry local stations and required nonduplication of their programs 15 days before and after broadcast. First Report and Order, 38 F.C.C. 683. At the same time, it issued a Notice of Inquiry and Notice of Proposed Rulemaking, stating its tentative decision to assert

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ing Industry 58-62 (Report to the FCC 1965). Among the companies engaged in CATV are General Electric, General Telephone and Electronics, Hughes Aircraft, RKO General and Time-Life. TV Digest, Television Factbook No. 37, at 568-a to 583-a (1967).

Indeed, respondent Trans-Video Corp., which owns or operates the other respondents, see n. 21 *infra*, was recently purchased by a subsidiary of Cox Broadcasting Corp. along with another small system for over seven million dollars. Broadcasting, March 13, 1967, p. 10. Cox owns and operates 20 CATV systems in 6 states, 5 large-city VHF television stations, and 4 AM radio stations, Moody's Industrial Manual, June, 1967, p. 566, and is tied to the company publishing the Atlanta Constitution and the Journal. TV Digest, Television Factbook No. 37, at 115-a (1967).

direct jurisdiction over CATV systems generally, to extend the carriage and nonduplication rules to nonmicrowave-served systems, and to adopt rules governing extension of signals from one television market into another television market. 1 F.C.C.2d 453.

Following the rulemaking proceeding and a deluge of comments from interested parties, the Commission in March 1966 issued its Second Report and Order (A. 1) explaining and adopting rules directly governing CATV transmission. The Commission concluded that unregulated expansion of CATV raised substantial problems of great significance to the public interest and that it could not "sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, 'Oh, well, so sorry that we didn't look into the matter'" (A. 52).

The Commission's concern was grounded on the economics of television broadcasting. Local television stations depend for income almost entirely upon advertising revenues, and an adequate level of advertising requires that the station develop and retain an adequate viewing audience. By bringing distant signals into a community (very often duplicating programs carried on the local stations), CATV systems splinter or fragment the local stations' audience and place existing local stations in jeopardy while discouraging the entry of new ones (A. 50).[10]

[10] A variant danger exists for noncommercial educational stations whose educational and cultural programming, buttressed by the new Corporation for Public Broadcasting, promises the development of one or more new public television networks of local stations throughout the country. While advertising revenues play no part in their budget, such stations depend importantly on financial support from local citizens, institutions and governmental bodies, support which can be lost when CATV imports distant educational channels. The distant station will not tie in so suitably to local needs and interests but as the stations have emphasized, people having paid once for commercial television as part of their CATV subscription are unlikely to pay a second time through contributions to the local educational station (A. 36-40).

Because CATV systems often remove their subscribers' receiving antenna when they are wired for CATV, the systems, if unregulated, have the added power to lock one or another local or area station out of subscribers' homes entirely by failing to carry it, or the CATV system may carry the local station but, for technical reasons, degrade its signal inducing the viewer to choose another channel. See First Report and Order, 38 F.C.C. 683, 702 (1965).

Lastly, by duplicating national or regional programs carried on local stations,[11] CATV destroys the costly exclusivity for which a local station has paid a national or regional program supplier in purchasing local rights (A. 54-55). In the case of national programs distributed by the major networks to their affiliates, such duplication may ultimately encourage the network to cancel as unnecessary the affiliation agreement which supplies the station much of its programming. As the Commission stated, "the CATV system presently stands outside of the . . . program distribution process" (A. 54). While the local station must bid for programs from suppliers and submit to bargained-for limitations on their use, CATV takes programs off the air at will and does so without payment to or permission from the program supplier, the copyright holder, the originating station, or the local station in the CATV community whose program is being duplicated (A. 54-55).[12]

The multiple impact of CATV seriously jeopardizes the financial ability of existing stations to operate in the public interest. At the extreme, a broadcaster may be driven off

[11] Program duplication is by and large on the same day and usually at the same time in the case of network programs. In the case of non-network programs duplication will normally be on different days. Indeed, the outside station may well carry a feature film or a series episode before the local station which has bargained for and obtained exclusive rights as against other local stations (A. 51).

[12] The question of copyright liability of CATV systems is pending before this Court in No. 618, Fortnightly Corp. v. United Artists TV, Inc., discussed pp. 33-35 *infra*.

the air completely if his share of the audience is sufficiently diminished. But even a moderate degree of pressure is likely to force the station to curtail its expensive and less profitable local programming—its unique contribution of local and area news, cultural programs and documentaries, state and city political reporting and similar community coverage.[13]

Of at least equal importance, CATV threatens to foreclose new stations from coming into existence by depriving them of both the audience and the exclusive programming vital to their development either at all or as effective local voices. New stations which do succeed in commencing operations may well find themselves unable to continue broadcasting or, at least, to provide the range of programming for which they are designed. These new stations, most of them destined for UHF channels, are the *sine qua non* of the national regime of free local television envisaged by the Commission.

For emerging UHF stations, hobbled by the limited number of sets initially able to receive them and by the lack of network affiliation in the numerous areas where the three major networks already have affiliates, unrestricted CATV operations could be fatal. The share of the total audience in a market available for independent stations is already small even without the added fragmentation of audience by importation of outside signals.[14] Under the best of circumstances UHF stations have a difficult time in the early

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[13] Nonlocal programming currently occupies about 84 percent of all commercial television station broadcast time, 85 percent of the time of network affiliates and 71 percent of the time of independent commercial stations. Television Magazine, August, 1967, p. 35.

[14] The Commission has found that the audience for all nonnetwork stations in most markets is limited to about 10 percent in prime time (A. 50). Respondents may contend, as was asserted during proceedings leading to the Second Report and Order, that CATV will help new UHF stations by bringing them into homes where they might not otherwise be received (A. 48). But as the Commission found, any gain in reception of UHF signals could be "far outweighed by the splintering of the limited audience for independent programing" (A. 50-51; see also A. 48 n. 54).

years.[15] Even in a city as large as Philadelphia the Commission recognized that the difficulties for UHF television could be great were no restrictions possible on CATV carriage of signals from New York (A. 48-50), and in smaller, even though important, markets even more serious problems are presented (A. 50 n. 57). Taking note of UHF's faltering past and improving prospects, the report declared that "we are at a watershed in the development of UHF broadcasting" (A. 46).

The Commission concluded that its statutory responsibilities did not permit it to stand idly by while CATV supplanted local broadcasting. As the Second Report and Order noted, the Commission's local broadcasting structure has been adopted by the Congress as national policy (A. 46-47), and CATV is thoroughly inadequate as a substitute. CATV systems cannot economically serve the sparsely settled areas, including rural areas, where the need for adequate off-the-air service is especially great for lack of other facilities. CATV also imposes a continuing cost that large numbers of poor citizens, increasingly an object of concern in our society, cannot afford without severe sacrifice, if at all. Finally, CATV does not serve as an outlet of local self-expression in the numerous ways that community-located stations do, and CATV will never be able to do so for those who are unable or unwilling to pay or who live in less dense outlying areas. See A. 51.

Accordingly, after reviewing and affirming its jurisdiction over CATV signal transmission, the Commission adopted "the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service" (A. 22). As a first step, the Commission modified and extended to all CATV systems the requirements earlier framed for microwave-served sys-

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[15] Of 94 UHF stations reporting profit and loss figures to the Commission for 1966, 39 percent reported losses and another 19 percent had profits of 50,000 dollars or less. FCC, TV Broadcast Financial Data—1966, at table 5 (1967).

tems. These included a carriage requirement based on a series of service priorities whose gist is to require local stations to be carried on the CATV system at their option without material degradation of signals. 47 C.F.R. §§ 1103(a), (b)(1967).[16] A related exclusivity requirement, also based on service priorities, provided that the system should not carry a program of one station duplicating a program available on a higher priority station on the same day.[17] 47 C.F.R. §§ 1103 (e)-(g) (1967).

Facing the larger question of limiting CATV importation of outside stations as such, the Commission acknowledged that "on the record before us, it is not possible to give a definitive answer to the future growth of CATV," particularly the extent of its penetration in major markets and its impact on UHF development in those markets (A. 49). As a corollary, it concluded that "we must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals" (A. 52).

The Commission therefore ruled that no new CATV system may carry into the Grade A contour of any local station in the 100 largest television markets the signal of any "distant" station (*i.e.*, one whose Grade B contour does not reach the community),[18] except upon a showing in an evi-

[16] As already pointed out, CATV systems have consistently declined to observe copyright requirements. Should a CATV system comply with copyright on a consistent basis, the Commission would not require it to carry any particular program as to which either it or the station requesting carriage could not obtain the necessary rights (A. 45, 116).

[17] This was a reduction of the earlier thirty day nonduplication period (A. 23-25, esp. ¶ 55; 117).

[18] The Grade A contour of a station delimits the area along whose outer perimeter good television reception may be expected 90 percent of the time at the best 70 percent of the locations. The Grade B contour is the line at which good reception may be expected 90 percent of the time at the best 50 percent of the locations.

dentiary hearing that such carriage is consistent with the public interest, and, specifically, the establishment and healthy maintenance of local television broadcast service.[19] 47 C.F.R. § 74.1107(a) (1967). The rules provided that the requirement could on request be waived by the Commission where appropriate. 47 C.F.R. § 74.1109(a) (1967).

Under a "grandfather" clause, outside signals being carried by existing CATV systems on February 15, 1966, may be continued but any geographic expansion by such systems is subject to limitation by the Commission where the public interest so requires. 47 C.F.R. § 74.1107(d) (1967).

In all other instances, the Commission's rules contemplated that it could decide on a case by case basis whether to hold hearings and grant relief against CATV transmission of outside signals. 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967). Importantly, these instances include (1) transmission into the area between the Grade A and Grade B contours of a station in the top 100 markets, (2) anywhere within the service area of a station in a market below the top 100, and (3) in "overlapping markets" situations, regardless of market size. Of this last instance, the Second Report and Order specifically noted that such individualized relief might be appropriate "if two major markets each fall within one another's Grade B contour (e.g., Washington and Baltimore)..." (A. 62 n. 69). As an example, it observed that the "carriage by a Baltimore CATV system of the signals of Washington... thus equalizing the quality of the more distant Washington signals . . . might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations" (A. 62 n. 69).

Finally, as a cornerstone of its CATV regime and indispensable to its effective operation, the Commission established procedures to halt the initiation or expansion of CATV service while ultimate limitations were being considered. New distant signals carried into the Grade A contour

[19] Although the Second Report and Order is largely concerned with the maintenance and development of UHF stations, the report and its rules relate to both UHF and VHF stations.

of major market stations were automatically forbidden until the Commission acted. 47 C.F.R. § 74.1107(a) (1967). In all other instances, including expansion of grandfathered systems, the rules provided for the Commission to determine whether temporary relief was called for in the public interest. 47 C.F.R. §§ 74.1107(d), 74.1109(f) (1967). A last loophole was closed by prohibiting CATV systems from commencing operations until after 30 days' notice and, if a petition respecting such service was filed within the period, until the Commission passed upon it or upon a request for temporary relief. 47 C.F.R. § 74.1105 (1967).

C. The Present Proceedings

Pursuant to the Commission's rules, petitioner Midwest Television, Inc., licensee of a television station in San Diego, California,[20] invoked the Commission's jurisdiction against respondents, four interrelated companies involved in CATV operations in San Diego.[21] Petitioners submitted affidavits and other materials to demonstrate the following: Respondents, each with grandfather rights under the CATV rules,

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[20] Midwest Television, Inc., operates a network-affiliated VHF station. When the Commission issued its interim order, a second petitioner, San Diego Telecasters, Inc., operated KAAR, an independent (nonnetwork affiliated) UHF station. The third petitioner, Jack O. Gross, holds a permit from the Commission to construct another independent UHF station. KAAR has temporarily suspended service and, since the filing of the certiorari petition, its assets and authorizations were transferred with FCC permission and are now held by Western Telecasters, Inc. A motion to substitute Western as a petitioner is being filed contemporaneously with this brief. The Commission has also been informed by Gross that he has agreed to transfer his authorization and that an application for approval will soon be filed.

[21] Mission Cable TV, Inc., owns several CATV systems in the San Diego area and holds franchises for others. Pacific Video Cable Co. owns CATV systems in an area near San Diego. Trans-Video Corp. is the owner of both Mission and Pacific and the operator of their systems and of the system owned by Southwestern Cable Co. which is located in the City of San Diego.

were importing into the San Diego area on a rapidly expanding basis the signals of six to nine Los Angeles television stations (A. 148-49).[22] San Diego, fifty-fourth largest television market in the country, was served by four San Diego area English language television stations—comprising three VHF stations affiliated with the three national networks and one independent UHF station—and by one Spanish language station (A. 148). In addition to a permit issued to petitioner Gross for a second independent UHF station, an application was pending for authority to construct a noncommercial UHF station, and the Commission was considering assignment of an additional UHF commercial channel to San Diego (A. 148).

It was also shown that as a result of CATV, viewership adequate to sustain the seven existing and potential San Diego area stations was being increasingly dissipated by importation of six to nine Los Angeles signals. Giving full effect to the nonduplication rule, nonetheless a large portion of the programs carried by the Los Angeles stations during a given week were substantially or exactly duplicated by programs available from the San Diego stations (A. 150).[23] Further significant expansion of respondents' CATV systems, which was imminent, would seriously dilute the

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[22] In April 1965, when the Commission issued its rulemaking notice leading to the present rules and placed existing and potential CATV operators on notice that it was considering sharp limitations on outside signal importations to which they would be subject, see p. 8 *supra*, Southwestern's system was not in existence while the Mission group had less than 6,000 subscribers according to exhibits it submitted to the Commission. Service to several San Diego area communities was initiated only two to four months prior to the filing of the petition in this case (A. 149).

[23] As the Commission itself recognized (A. 24, 117), the nonduplication rule by itself is inadequate because, as already noted, it only relates to identical programs received the same day and most duplication of nonnetwork programs occurs earlier than or subsequent to the local broadcast. See n. 11 *supra*.

viewing audience to the point of imperiling the ability of existing stations to provide sound and attractive programming and of the unborn UHF stations to come into being (A. 151).

Accordingly, the Commission was requested to restrain permanently after a hearing, with temporary relief in the interim, any further expansion of the transmission of Los Angeles signals over respondents' CATV systems into new geographic areas. Opposing affidavits and pleadings were submitted by respondents. After considering the voluminous papers before it, the Commission ruled that there existed "a classic case" for a full evidentiary hearing on CATV's impact on San Diego television (A. 161) and designated the case for hearing. The Commission's opinion took particular note of the "considerable UHF activity currently under way in San Diego" and of the respondent CATV systems' "potential for expanding throughout the entire county" (A. 162).[24]

The Commission found interim relief to be essential, noting that in its absence "within a very short period of time the systems could wire up thousands of new subscribers" (A. 163). It emphasized, as it had in the Second Report and Order, "the impracticability of withdrawing service, once established, because of its disruptive effect" and "the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (A. 163). Consequently, without curtailing the addition of new subscribers to receive signals of San Diego

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[24]The respondents had wired up only a relatively small number of homes located in discrete communities or areas; on the grandfather date, about 17,000 homes (4.6 percent) within Midwest's Grade A contour were CATV subscribers, grouped in eight islands of service (A. 152 n. 3, 163). However, CATV cable lines had been laid in portions of communities with 294,000 of the homes (78 percent) within that contour and CATV franchises covered 90 percent of the homes (A. 163).

area stations, it halted pending the hearing the expansion of transmission of Los Angeles signals outside designated geographic areas in which the systems were operating on the grandfather date (A. 170-72).

Respondents appealed the Commission's grant of temporary relief to the Court of Appeals for the Ninth Circuit. After modifying the Commission's interim stay pending review to allow new subscribers to be added to trunk and feeder lines existing at the date of the order (A. 180), the Ninth Circuit ruled that the Commission lacked statutory authority to issue the order. The court's opinion stated that, in light of *Regents* v. *Carroll*, 338 U.S. 586 (1950), "sections 4(i) and 303(r) [of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) (1964), conferring on the Commission general authority to make necessary rules and orders] are limited to the scope of the Commission's licensing authority" (A. 192). The court entered a judgment setting aside the Commission's grant of interim relief (A. 194) but stayed its own mandate pending certiorari proceedings. At the request of the Solicitor General, Mr. Justice Brennan amended the stay of mandate to permit additional time for the filing of a certiorari petition.[25]

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[25] After conducting the hearing ordered on permanent relief, the FCC's hearing examiner on Oct. 3, 1967, issued an initial decision declining to limit CATV expansion in the San Diego area although proposing other types of relief. Respondent Southwestern then moved the Commission to vacate its temporary stay. On Nov. 8, 1967, the Commission denied the motion pointing out that exceptions were being filed to the initial decision and "the examiner's conclusions as to the significance of the evidence of record do not constitute a final determination." It added that "Southwestern's [financial] position is improving rather than deteriorating" and emphasized its willingness to reconsider if circumstances changed. Memorandum Opinion and Order, FCC 67-1224, at 5.

SUMMARY OF ARGUMENT

I. The Communications Act of 1934 confers upon the Commission ample authority to regulate CATV carriage of television station signals. The Act applies to "all interstate ... communication by wire or radio," section 2(a), 47 U.S.C. § 152(a) (1964), and CATV constitutes "communication by wire or radio" as defined by the Act, sections 3(a), 3(b), 47 U.S.C. §§ 153(a), 153(b) (1964), and is "interstate" communication because the signals are in the stream of interstate commerce, *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933). *Regents* v. *Carroll*, 338 U.S. 586 (1950), does not limit the Commission's authority over CATV; that case involved not only a private dispute but also the Commission's power over private parties not asserted to be engaged in interstate communication by wire or radio.

Further, the Commission is granted power "to establish areas or zones to be served by any station," to distribute television stations themselves among the states and communities, sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964), and to make rules, restrictions and orders necessary to the implementation of the Communications Act, sections 4(i), 303(r), 47 U.S.C. §§ 4(i), 303(r) (1964). Such legislation conveys adequate authority to carry out the basic statutory functions and to contend with related activities threatening to frustrate the legislative scheme. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). The District of Columbia Circuit Court of Appeals in *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967), held that the Commission can regulate CATV television signal carriage, properly concluding that its statutory authority is not rigidly compartmentalized into station licensing and common carrier regulation. See *Benanti* v. *United States*, 355 U.S. 96, 104 (1957); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

Lastly, authority over CATV is warranted to fulfill the statutory aims of television service to "all" Americans and a fair distribution of stations to individual communities, sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964), which the Commission has sought to achieve through a television structure, approved by the courts and the Congress, which is based on widespread local broadcasting stations and relies heavily upon UHF channels. *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir. 1954); H.R. Rep. No. 1559, 87th Cong., 2d Sess. 4 (1962). If unregulated CATV is allowed to destroy the emerging local television stations by duplicating local programs, failing to carry local stations and fragmenting audiences, free local broadcast service will be available only in large cities and numerous Americans who cannot afford CATV or live in rural areas outside its reach may be wholly deprived of television.

II. The Commission has authority to limit temporarily the expansion of CATV television signal carriage in the San Diego area of Los Angeles stations pending an evidentiary hearing to determine whether expansion would serve the public interest. As already noted, the introduction of distant signals into a major market where there is significant UHF activity presents "a serious question" of harm to the public interest (A. 57), and without interim relief substantial damage may be done while that question is resolved.

During the necessarily detailed investigation CATV expansion could do fatal injury to the public interest, and once entrenched CATV cannot practically be rolled back, as the grandfather rules implicitly recognize and the Act confirms in analogous situations. Section 319, 47 U.S.C. § 319 (1964). Under established precedents, the Commission's power to issue necessary rules and orders authorizes issuance of an order so essential to fulfillment of its statutory responsibilities, and decisions in both the Tenth and District of Columbia Circuits squarely support the use of such powers to impose temporary restraints. *Amerada Petroleum Corp.* v. *FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976

(1962); and *R.A. Holman & Co.* v. *SEC*, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962).

Respondents, afforded ample opportunity to submit in writing any contentions and evidence they wished, were deprived of no procedural rights due them. Section 312, 47 U.S.C. § 312 (1964), requiring a hearing for issuance of cease-and-desist orders, was not and could not be applied. In terms and in policy it is directed at issuing permanent restraints against violation of particular statutes, regulations, or license provisions while the order here is merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required. There is no automatic right to a hearing or oral presentation. *FCC* v. *WJR*, 337 U.S. 265 (1949); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437 (D.C. Cir. 1949). In any event, in the present case virtually all the facts relevant to the interim order were not in dispute.

ARGUMENT

I. THE COMMISSION HAS AUTHORITY UNDER THE COMMUNICATIONS ACT OF 1934 TO REGULATE THE TRANSMISSION OF TELEVISION SIGNALS BY CATV SYSTEMS.

The decision below held invalid the Commission's interim order limiting expanded CATV transmission in the San Diego area of Los Angeles television signals, an order issued after receipt of substantial cross pleadings and affidavits and designed to safeguard the public interest in free local television broadcast service pending a full evidentiary hearing on the impact of such expansion on that service. The central rationale of the court's opinion appears to be that the Commission entirely lacks authority to regulate CATV systems directly because its statutory power does not extend beyond broadcast station licensees. This reading is borne out by the

opinion's principal reliance upon this Court's decision in *Regents* v. *Carroll*, 338 U.S. 586 (1950).[26]

The overwhelming weight of statutory language, relevant precedent and policy considerations establish the Commission's authority to regulate television signal transmission by CATV, and the District of Columbia Circuit so held in *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967).[27] As we shall show, (A) the Commission's express authority over interstate communications by wire or radio encompasses CATV systems and definitively distinguishes *Carroll*; (B) the broad powers granted by the Communications Act and elaborated in judicial decisions amply warrant Commission regulation of CATV transmission; and (C) such regulation is essential to the express purposes of the Communications Act, to the local broadcasting structure which the Congress has approved and to the public interest generally.

A. *The Scope of the Statute*

The Communications Act is designed to provide unified federal control over interstate wire and radio communication. The statute affirms this broad scope in the first section, stating that its enactment is "for the purpose of regulating interstate . . . commerce in communication by wire and radio . . . ." Section 1, 47 U.S.C. § 151 (1964). The second section makes clear that "the provisions of this [Act] shall apply to all interstate . . . communication by wire or radio . . . and to all persons engaged within the United States in such communication . . . ." Section 2(a), 47 U.S.C. § 152(a) (1964).

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[26] It is confirmed by a later decision of the Ninth Circuit, Valley Vision, Inc. v. United States, Nos. 21869-70 (June 29, 1967) (order). See p. 38 *infra*.

[27] The *Buckeye* decision, not yet officially reported, is reprinted at page 67 of the certiorari petition filed in No. 363 by the United States and the Commission.

CATV systems are engaged in interstate communication by wire or radio as defined by the Act. Sections 3(a) and 3(b) define wire and radio communication respectively as "transmission" "by aid of wire, cable, or other like connection" in the former instance, and "by radio" in the latter, of "writing, signs, signals, pictures, and sounds of all kinds" and as "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), 153(b) (1964). Unquestionably CATV systems receive, transmit and deliver signals, pictures and sounds by wire.[28]

That this transmission constitutes "interstate" communication is well settled by the authorities. The CATV systems are part of the stream of continuous interstate communications by radio and television. *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933); *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (D.C. Cir., June 30, 1967). They are thus within FCC jurisdiction even though located within a single state.[29]

Under the circumstances it is not surprising that petitioners do not quarrel with the basic proposition that their CATV systems are engaged in interstate communication. Indeed, CATV operators acting through their national trade association, the National Community Television Asso-

[28] They also engage in radio communication as instrumentalities incidental to the transmission of the sending station's signal. Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955). It is unquestioned that "radio" as used in the Communications Act embraces television signals. Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153 (3rd Cir. 1950), cert. denied, 340 U.S. 929 (1951).

[29] See Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936); Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.), cert. denied, 371 U.S. 820 (1962); United States v. American Tel. & Tel. Co., 57 F.Supp. 451, 454 (S.D.N.Y. 1944), aff'd per curiam sub nom. Hotel Astor v. United States, 325 U.S. 837 (1945); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965).

ation, have strongly argued to state public utility commissions – in an effort to escape regulation by state bodies – that CATV systems "are unquestionably engaged in interstate commerce" and are "directly concerned with television broadcasting, an area of governmental control which there has been complete occupation by the Federal Government . . . ." Brief of NCTA Before the Conn. PUC, Docket No. 10250, pp. 3, 9 (1964).

CATV's status as interstate communication by wire or radio cannot be evaded by labeling the systems "master antennas" or seeking to assimilate them to home television receivers. These characterizations are contrary to fact and have been rejected outright by the Commission (A. 56) and by the courts. See, *e.g.*, *Buckeye Cablevision, Inc.* v. *FCC* No. 20274 (D.C. Cir., June 30, 1967). Similarly, in *United Artists TV, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 180 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *cert. granted*, 36 U.S.L.W. 3221 (Dec. 4, 1967) (No. 618), the court described "community antenna" as a "misnomer" reflecting a "fundamental misconception":

> "Nor are defendant's [CATV] operations simply that of passive 'antennas' used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs– operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas."

Understanding the true nature of CATV systems, summed up in a later passage in the *Fortnightly* opinion as "in material respects, analogous to television stations, translator and repeater stations," 255 F. Supp. at 196, should lay to rest all efforts to invalidate CATV regulation by wrongly classing the systems with other objects decidedly outside Commission authority. Unlike home antennas, newspapers, movies theaters and numerous other objects and enterprises, CATV systems are engaged in interstate communication by

wire or radio, the subject of the Communications Act. The Commission's assertion of authority and its rationale go no further.

Carroll, whose language the Court of Appeals found "guided" its "resolution" of the present case (A. 190), dealt with a legal question wholly unrelated to that presented here. That case grew out of a refusal of the Commission to renew a radio station license until its licensee repudiated a contract to purchase the stock of a nonlicensed company formerly engaged in managing the station for the licensee. When the licensee did so, the selling stockholders sued in state court and recovered an award of contract damages from the licensee. Upholding the judgment against a claim that under the Supremacy Clause it was barred by the Commission's action, this Court stated that the Commission's statutory power to make necessary rules and conditions had to be construed "in connection with" its licensing power and "cannot directly affect the [license] applicant's responsibilities to a third party . . . ." 338 U.S. at 600.

The management company in *Carroll* was an unlicensed private concern with no asserted relationship to the Commission or status under the Act and its stockholders were the actual parties to the contract. Indeed, the controversy arose because the Commission objected to having the station actually managed not by its licensee but by a third party. By contrast, the CATV systems are entities engaged in interstate communication by wire or radio whose regulation is the statute's declared aim and the very purpose of the Commission.[30]

The court below in resting its decision upon *Carroll* ignored this Court's reiterated warning against the borrowing of abstract language from opinions without due regard

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[30]The other Supreme Court decision quoted by the Ninth Circuit, FCC v. American Broadcasting Co., 347 U.S. 284 (1954), simply forbade the Commission to outlaw "giveaway" programs as lotteries in the face of a federal statute governing the subject and has no bearing on the present case.

for differing facts,[31] language which in *Carroll's* case was largely directed to a statutory gap that has since been filled by the Congress. 66 Stat. 17, adding section 312(b), 47 U.S.C. § 312(b) (1964). In the words of the Court of Appeals for the District of Columbia Circuit, affirming the Commission's power over CATV in the face of an identical argument:

> "We do not have to decide the degree to which *Carroll* may still be viable since we think that, in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme." *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967), p. 7.

B. *The Commission's Regulatory Powers*

The powers with which the Communications Act endows the Commission are ample to encompass regulation of CATV transmission by the Commission – the only aspect of CATV operations over which authority is claimed. There is no attempt to franchise or otherwise regulate entry into business, determine the number of CATV systems that may operate in particular areas or fix rates.

Central to the Commission's authority is its power "to establish areas of zones to be served by any station" and its mandate to distribute "licenses, frequencies, hours of operation, and of power among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964). These sections provide the foundation of the Commission's carefully planned table of assignments. Yet they are hollow if they furnish no basis for harnessing CATV operations. There can be no meaningful areas or zones or effective distribution of stations if CATV remains free to carry stations au-

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[31] *E.g.*, United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 n. 22 (1956); Hughes v. Superior Court, 339 U.S. 460 (1949).

thorized to serve the Los Angeles area a hundred miles away and disseminate their signals in the San Diego area ultimately at the cost of San Diego local service.[32]

The statute also grants the Commission generous power "to make such rules and regulations, and issue such orders" not inconsistent with the Act "as may be necessary in the execution of its functions" and, in a later section, to "make such rules and regulations and prescribe such restrictions and conditions" not inconsistent with the Act "as may be necessary to carry out [its] provisions . . . ." Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r) (1964). Illuminated by the precedents, these provisions reinforce the Commission's more specific powers.[33]

The decisions of this Court and of lower tribunals establish that regulatory statutes which provide basic policy responsibilities and broad powers are intended to permit the agency to carry through the basic aims of the Congress and to contend with aligned activities and problems not detailed in the statute that threaten to frustrate the legislative pur-

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[32] As the Commission has noted, "in addition . . . there exists [in CATV] the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 [47 U.S.C. §§ 303(p), 310, 315, 317, 508 (1964)] (and certain Commission regulations)" (A. 70 n.4).

[33] The court below apparently regarded the significance of these sections as somehow diminished by their "placement . . . within the structure of the Act" (A. 188 n. 5). We will not discuss here the relative importance of their neighboring provisions nor even the fact that the Act does not rank its provisions in importance by their "placement." In all events: "there is no dearth of decisions making it clear that [such provisions] are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967). See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

pose. "A broad delegation of power is not only a power, it is a summons to create order." Jaffe, Judicial Control of Administrative Action 49 (1965). The precept is well illustrated in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), construing the Communications Act itself. Upholding the Commission's power to adopt rules regulating network-station practices nowhere mentioned in the statute, the Court emphasized that "the Act gave the Commission not niggardly but expansive powers" and sought not "to frustrate the purposes for which [it] was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." 319 U.S. at 219-20.

The Court reiterated the same fundamental principle in *American Trucking Associations v. United States*, 344 U.S. 298 (1953), which sustained the Interstate Commerce Commission rules directed at carrier use of equipment over which the Commission lacked general authority under a statutory exemption. Observing that "the rules in question were aimed at conditions which might directly frustrate the success of the regulation undertaken by Congress," the Court relied expressly upon the statutory duty of the Commission, no broader than the FCC's grant, "'[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.' § 204(a)(6)." 344 U.S. at 311. As the Commission has found in its Second Report and Order, CATV transmission is within its jurisdiction and subject to its powers and yet, if unregulated, threatens to frustrate those very powers and the larger purposes those powers are designed to serve. It was similarly the Commission's duty to regulate CATV.

Unencumbered by a mistaken reading of *Carroll*, the Court of Appeals for the District of Columbia Circuit found the lessons of *National Broadcasting* and *American Trucking Associations* squarely applicable to the problem of Commission authority over CATV. In *Buckeye Cablevision, Inc.* v. *FCC*,

No. 20274 (June 30, 1967),[34] a unanimous panel of the District of Columbia Circuit rejected the same array of arguments pressed by respondents below and, bolstered by the cases which have recognized the authority of an agency "to deal with aligned activities which may affect the regulatory system entrusted to the agency," held the congeries of powers entrusted to the Commission readily support its jurisdiction over CATV television signal transmission. P. 8.[35]

Buckeye also rejected the contention, advanced below, that the Communications Act's legislative origins show it to be a mere consolidation of common carrier and radio station licensing statutes, that this division is continued respectively in titles II and III of the present statute, and that CATV is outside the Act because neither a common carrier nor a licensed radio station. Even were attention focused solely upon title III drawn from the old Federal Radio Act, its scope is by no means limited to station licensing. The title is designated "provisions relating to radio" – not "radio station broadcasters" – and it contains a number of provisions that say nothing of station licenses or licensees.[36] CATV rules which concern carriage of television signals and are vi-

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[34] It may be noted that, despite the importance of *Buckeye* and its conflict with the previously decided case below, the CATV system did not seek certiorari.

[35] In so doing, the court bore out the intimations of other panels in earlier cases whose language foreshadowed *Buckeye* itself. See Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 517 (1955); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, cert. denied, 375 U.S. 951 (1963); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (1966).

[36] *E.g.*, sections 303(g) ("generally encourage the larger and more effective use of radio"); 303(s) (the Commission may require that television sets be manufactured to receive UHF); 313 (antitrust laws application to radio manufacture, sale and trade); 328 (Secretary of State represents Canal Zone in international radio), 47 U.S.C. §§ 303(g), 303(s), 313, 328 (1964).

tal to preserve express powers over transmission range very much "relate to radio."

More fundamentally, this "suggestion that the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions," *Buckeye, supra,* p. 7 n. 19, is repugnant to the Act's language, its history, and judicial precedent alike. The statute applies to "*all* interstate . . . communication by wire or radio." Section 2(a), 47 U.S.C. § 152(a) (1964) (emphasis added). Far from being a mere aggregate of scattered statutes it is a self-asserted grant "of *additional* authority with respect to interstate and foreign commerce in wire and radio communication . . . ." Section 1, 47 U.S.C. § 151 (1964) (emphasis added). The Commission was created "to regulate all forms of communication," H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3, (1934), and the statute itself—in this Court's words—constituted "a comprehensive scheme for the regulation of interstate communication." *Benanti* v. *United States,* 355 U.S. 96, 104 (1957). While its detailed provisions naturally aimed at the subjects most familiar to the Congress and urgent to the times, "Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence. . . . In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry." *Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966).[37]

[37]This language is particularly significant since the court held that it was a "rational and hence permissible choice" by the Commission to reject a petition to regulate CATV systems as common carriers and rather to regulate them as "adjuncts of the nation's broadcasting system." 359 F.2d at 284. For an earlier articulation of the proposition that the statute must be looked at as a whole and that the Communications Act does not require the FCC to fit its actions into a particular subcategory of communications, see Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 362 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

These established statutory powers are in no way circumscribed by supposed past disclaimers by the Commission of authority over CATV or its efforts to obtain CATV legislation from Congress. The Second Report and Order's analysis of past Commission decisions adequately demonstrates that there is no settled administrative interpretation favoring CATV immunity from control (A. 8-9). Even if there were such an interpretation, the Commission is not foreclosed from correcting past errors.[38]

Nor may adverse inferences be drawn from the Commission's request for "congressional guidance as to policy and congressional clarification of our authority" in the CATV field (A. 63). An agency must be entitled and encouraged to clarify its mandate and avoid litigation even though itself certain of its authority. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966). The Congress had explicitly taken no position on the jurisdictional question, H.R. Rep. No. 1635, 89th Cong., 2d Sess. 9 (1966), and its failure to enact legislation governing CATV, if it warrants any inference, would suggest that it is content to allow the Commission to proceed with its CATV rules.

C. *Statutory Purposes and Federal Policy*

We have shown that regulation of CATV transmission is supported by the express scope and statutory powers of the Act. Such regulation is also essential to fulfill the program designed by the Commission and approved by the courts and the Congress "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide ...

[38] As this Court said of the ICC last Term: "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency." American Trucking Associations v. Atchison T.&S.F.R.R., 387 U.S. 397, 416 (1967).

wire and radio communication service," and to provide "a fair, efficient, and equitable distribution" of television broadcast service throughout the country. Sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964).

The national television broadcasting structure described above in the Statement furthers both of these statutory purposes. That structure is aimed at providing first, free television broadcast service for all Americans, second, local or area stations for as many communities as possible, and third, multiple service for large numbers of Americans. See pp. 3-4 *supra*. Local stations give access to national programming while preserving the many benefits of community coverage, such as local news and weather, forums for state and local affairs, entertainment and cultural programs meeting the interests of the community, and business information and advertising suited to local enterprise. By multiplying stations and limiting ownership and control the Commission avoids the dangers of concentrating influence in a few hands, assures broadcast service in national or local emergencies when central communication may be lost and lays the groundwork for advances such as additional national networks, new regional and special networks and more diverse local voices.[39] In short, the Commission's program represents a planned and principled effort of the kind properly urged upon regulatory agencies by courts and critics,[40] and its approval by the courts and by the Congress

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[39] See Second Report and Order (A. 46, 51); Sixth Report and Order, 1 P & F Radio Reg. 91:601, 622-24, 17 Fed. Reg. 3905, 3912-13 (1952). In adopting this approach, the Commission rejected the so-called DuMont plan for superpower stations concentrated in a few major cities blanketing the country with their programs, the very effect unregulated CATV is destined to produce. *Id.* at 91:622, 17 Fed. Reg. at 3913.

[40] See Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 142-147 (1962). It provides a marked contrast with the random development of AM radio where licenses were long passed out almost on demand and without regard to long-range need or policies.

firmly establishes it as a national policy. See pp. 4-6 & nn. 3, 5-7 *supra*.[41]

As the Commission has found, CATV harbors the potential to scuttle UHF development and undermine the present and potential local broadcasting system, thereby frustrating established public policy, making the all-channel receiver legislation an exercise in futility and wasting the large investment in UHF stations and in sets purchased to receive them. At the very time that UHF television approaches the critical state in its evolution, with new stations striving to gain a foothold and potential applications in the balance, "CATV growth has been explosive and gives every indication of continuing its phenomenal spurt" (A. 47). Indeed, "CATV activity is accelerating in areas where there is the greatest interest in UHF development" (A. 15). See pp. 7-8 *supra*. The comparatively straightforward economics of television broadcasting — the vital relationship between audience and revenues (or educational television gifts and grants) — makes it certain that program duplication, locking local stations out of CATV homes and general audience fragmentation through expanding CATV importation of outside signals presents a significant danger to local television. This has been the Commission's expert judgment and the evidence backing up its evaluation is detailed in the Commission's lengthy First Report and Order, 38 F.C.C. 683 (1965), and Second Report and Order (A. 1).

The considerations supporting Commission authority are unaffected by recognition of CATV's liability under the

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[41] The House Report on the all-channel receiver law has described UHF television as "not only the best but the only practical way of achieving an adequate commercial and educational system in the United States" and declared the national goal to be to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression" with additional stations proportionate to the size of the population. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3-4 (1962).

copyright laws, the question pending in No. 618, *Fortnightly Corp* v. *United Artists TV, Inc.* Copyright application to CATV and Commission regulation have complementary but different functions; they are not alternative regimes for governing CATV. Each derives from different principles and is directed to different, albeit to some extent, overlapping, interests. Neither one legally or practically obviates the need for the other.

Copyright aims to secure for the creator of a work the choice of the methods of marketing it among users and to prevent its commercial exploitation by those who do not pay for his permission. It is these principles, and precedents such as *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), that lie behind the just claim that CATV systems are liable for use of copyrighted works.[42] The Communications Act serves the quite different, though not inconsistent, end of regulating radio and television communications in accordance with policies spelled out in the original statute and in later legislation such as the all-channel receiver law.

Recognition of CATV's responsibility to the copyright owner in no way dispenses with the practical importance of Commission authority to safeguard the public interest in free, local broadcasting. As to copyrighted programs, the reasonable assumption is that the owner and the CATV system would frequently agree upon a license, leaving the latter free to carry programming into the local station mar-

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[42]The argument that CATV liability will give the copyright owner "double" payment, because the station will itself increase its copyright license payment in proportion to expanded CATV coverage, is both inaccurate and irrelevant. For example, some station advertisers are local and have no interest in the market reached by CATV. Even if there were a proportionate rise, the copyright owner is as much entitled to reap the full rewards of his copyright here as he would be if two separately located local stations broadcast his work simultaneously.

ket devastating the local audience base as always. For the numerous programs which are not copyrighted at all, the CATV systems would continue to take them off the air at will. In all events, the Congress intended that the Commission assume responsibility for development of radio and television and declined to leave one of the Nation's "most valuable and limited natural resources," H.R. Rep. No. 1559, 87th Cong., 2d Sess. 5 (1962), wholly to the vagaries of the marketplace.[43]

In the face of the CATV threat to local broadcasting, the Commission has asserted its jurisdiction in a markedly restrained manner.[44] The requirements that, on a priority of signal basis, CATV carry local stations and abstain from duplicating local programs on the same day are beyond reasonable criticism. The public interest is not served by locking local stations out of CATV-served homes or importing distant signals which carry the identical program avail-

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[43]Conversely, the CATV rules do not seek to do the job of the Copyright Act, as the Commission has made quite clear. The nonduplication rules do not apply, as a practical matter, to the large number of nonnetwork programs. See A. 24, ¶ 55; 116, 117. The distant signal rules leave the CATV systems free to carry the programs of many nonlocal stations without the consent of the copyright owner. Thus, without copyright a local station cannot bargain with the owner for local program exclusivity against CATV importation of the same program, although incongruously the economics of television broadcasting have long been based on the exclusivity each station receives as against other stations in the same town-(A. 54-55).

[44]The regulatory regime is especially mild compared to the obligations that would have ensued had the Commission exercised its option to govern CATV systems as common carriers as urged in *Philadelphia Television*. See p. 37 *supra*. In most cases common carriers within the Act's purview are obliged to furnish service on request, be "just and reasonable" in their rates and practices as determined by the Commission, and obtain a certificate of public convenience and necessity for any line or extension and Commission permission to discontinue service. Sections 201, 205(a), 214(a), 47 U.S.C. §§ 201, 205(a), 214(a) (1964).

able on the same day from the local station which has often paid handsomely for the exclusive right of distribution in the area. Yet should the Ninth Circuit be upheld in its view that the Commission lacks authority over CATV, the carriage and nonduplication rules could not be enforced.[45]

In framing the distant signal rules, the Commission declined to accept reasoned proposals for more stringent limits on CATV distant signal carriage (A. 66-69). New CATV systems remain free to import distant signals in certain circumstances upon a showing by them that it would be consistent with the public interest and in other circumstances unless a complaining party shows that it would not be consistent with the public interest.[46] 47.C.F.R. §§ 74.1107(a), (c), 74.1109(a) (1967). CATV systems operating on the grandfather date can continue carrying distant signals then being carried to existing subscribers and expansion of the systems outside their present geographic area is allowed unless the Commission finds limitations necessary in the public interest. 47 C.F.R. § 74.1107(d) (1967).

If the Commission lacks power to prescribe bare-bones rules governing CATV, it cannot assure the fulfillment of the Act's express purposes to provide service to all Americans and guarantee a fair distribution of stations around the country. There is no fair distribution if uncontrolled CATV expansion devastates local broadcasting stations and if television broadcasting becomes the monopoly of stations in a

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[45] The proceeding initiated by the Commission, though not the temporary order on review in this Court, did in fact involve the question whether local signals were being degraded in the course of carriage by respondent systems (A. 172-73).

[46] The Commission has, in fact, administered its distant signal and related rules with considerable liberality toward CATV carriage of outside signals. *E.g.*, Cedar Rapids TV Co. v. FCC, No. 20783 (D.C. Cir., Sept. 27, 1967); Channel 9 Syracuse, Inc. v. FCC, No. 20843 (D.C. Cir., Sept. 26, 1967); Hubbard Broadcasting, Inc. v. FCC, No. 20924 (D.C. Cir., Oct. 30, 1967); In re Fetzer Cable Vision, 6 F.C.C.2d 845 (1967); In re Jonesboro Cable TV, Inc., 9 P & F Radio Reg. 828

few huge metropolises like New York, Los Angeles and Chicago. There is no service to all Americans if the demise of local broadcasting outside the largest cities leaves the rest of the country dependent upon CATV which requires ongoing payments difficult or out of reach for many Americans and which is not available at any price in rural areas.

It would be a mockery of congressional intentions if CATV were allowed to frustrate these policies by accomplishing for the television stations what they themselves could never do consistent with the statute. As the Commission stated, if stations in one market sought to extend their signals into another market by applications for auxiliary television transmitting stations it could not seriously be argued that the applications should be granted because "while they may be destructive of congressionally established goals, events in the marketplace should be allowed to give the answer. The matter is not really different here" (A. 52).[47]

This Court has repeatedly emphasized that the aims of legislation are a prime measure of the power it confers and has given full weight to national policy in its construction. See, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Piedmont & N.R.R.* v. *ICC*, 286 U.S. 299 (1932). Here the statutory purpose favors CATV regulation. The statute expressly covers such interstate wire or radio communication. The broad grant of power is ample to support the jurisdiction claimed. The case in support of the Commission's authority over CATV television signal transmission is thus overwhelming.

(1967); In re Community Antenna Co., 9 P & F Radio Reg. 1151 (1967).

[47] This conclusion applies not only to the goals relating to a nationwide pattern of local television stations but also to the FCC's rules and policies respecting concentration of control of the television medium in nearby areas such as Los Angeles and San Diego.

II. THE COMMISSION'S AUTHORITY TO REGULATE CATV SYSTEMS ENCOMPASSES A TEMPORARY STAY OF THEIR EXPANSION PENDING A PLENARY HEARING TO DETERMINE WHETHER IT WOULD SERVE THE PUBLIC INTEREST.

Given the authority of the Commission to regulate CATV importation of outside signals and given also its conclusion that this authority should be exercised through procedures that enable it to determine the public interest on a case-by-case basis, the further question is presented whether the Commission can prevent such importation while it is making such a determination.

The respondents argued in the court below that the Commission's temporary order limiting the further importation of Los Angeles signals into the San Diego area during the hearings on the public interest issues was invalid because, even assuming Commission authority to regulate such CATV transmission, no prior evidentiary hearing had been held. The paradoxical quality of this argument should be noted from the outset since the Commission could have exercised its authority over CATV transmission by issuing a general rule freezing CATV expansion of outside signal importation completely as was urged by various parties in the rulemaking proceeding. See pp. 51-52 *infra*. It would be ironic indeed in these circumstances if the far less restrictive system of regulation adopted by the Commission were to fail.

It should also be noted that the lack of an evidentiary hearing was not of significant concern to the court below, for its opinion concentrates upon Commission power to to regulate nonlicensees. Its preoccupation with the threshold question of basic authority was again revealed in a later case where the Ninth Circuit cited its present opinion as the sole authority for staying Commission enforcement of its CATV rules even though the Commission was not alleged to have denied any procedural rights whatever. *Valley Vision, Inc.* v. *United States*, Nos. 21869-70 (June 29, 1967) (order). However, since respondents will doubtless renew their procedural contention, we will show (A)

that provisions of the Act, the circumstances of the case and settled case law sanction the temporary stay and (B) that all due procedural requirements for its issuance were accorded.

A. *Power To Grant Interim Relief*

The Commission's grant of an interim stay is properly grounded in its express power to issue orders and prescribe restrictions requisite to accomplish its statutory responsibilities. Section 4(i), 47 U.S.C. § 154(i) (1964) provides:

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."

See also Section 303(r), 47 U.S.C. § 303(r) (1964).[48]

There is no provision of the Act or any other law "inconsistent" with the Commission's temporary stay directed at CATV systems – enterprises that are subject to its jurisdiction.[49] The temporary stay is "necessary" in the context of the regulation of CATV signal transmission to prevent irreparable injury to the statutory policies entrusted to the Commission.

The bond between the legislative aims expressed in the Communications Act and underlying the all-channel receiver law and the further development of local broadcasting outlets has already been established, both in earlier discussion here, pp. 3-6 *supra*, and in the Second Report and

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[48] "Except as otherwise provided in this [Act], the Commission from time to time, as public convenience, interest, or necessity requires, shall–

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]. . . ."

[49] The suggestion that the Commission's order is invalidated by section 312, 47 U.S.C. § 312 (1964), is answered at pp. 50-53 *infra*.

Order (A. 46). The multiple dangers that unregulated CATV poses for such development, also fully documented, pp. 9-12 *supra* and A. 49-51, fully justify the Commission's restrained conclusion in the Second Report and Order that "a serious question" is presented "whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" (A. 57).

The question arises very sharply when, as here, CATV systems seek to intrude nonlocal television signals into the heart of a television market where there is significant UHF activity, present and potential. Normally such intrusion will be attempted by extension of nonlocal signals beyond their Grade B contours. However, as the report makes clear, an identical hazard for local television may be presented if major markets fall within one another's theoretical contours and CATV works to equalize the quality of the nonlocal signals (A. 63).[50]

Accordingly, the Commission committed itself on a market-by-market basis to a "thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed" (A. 58). Recognizing that market hearings might consume substantial time, the Second Report and Order pointed out that they would normally

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[50]The illustration used by the Commission involved two closely located, albeit quite distinct, markets: Washington and Baltimore. The hazard is all the greater where, as here, the markets are located 100 miles apart and the fortuitous location of the transmitters of the Los Angeles stations on a 6,000 foot mountain, TV Digest, Television Factbook No. 37, at 72-b to 82-b (1967), results in the penetration of marginal Los Angeles signals into only a small portion of San Diego. Unlimited CATV operations would equalize Los Angeles and San Diego signals throughout the entire San Diego area where Los Angeles signals are generally unusable off the air.

be confined to the major markets "where there is generally no dearth of service and new UHF services are coming on the air" (A. 58). The report listed among the many issues to be studied in each case the details of local CATV operations, marketing studies, present and future television service and pay-TV potential (A. 58).

A halt in CATV expansion during the course of a hearing is no less "necessary" than the hearing itself. As the Second Report and Order states, "Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation," should the hearing reveal that expanded CATV transmission is contrary to the public interest (A. 58). Expansion means not only that the CATV system will have made an investment but that subscribers will have had their televisions sets wired and their external antennas removed, often paying substantial installation fees. Thus, to safeguard the public interest from CATV operations in the major markets, "it is necessary to examine thoroughly such operations before they become established or well entrenched" (A. 58).

During the hearing unabated CATV expansion could do irreparable harm. Most UHF stations are in their early years of service operating on small profit margins or on invested capital or debt while securing an audience,[51] and they may easily succumb during proceedings which the Commission acknowledged "may consume some significant period of time" (A. 58). Moreover, new UHF activity would be discouraged if CATV expansion could not be stayed. Potential investors would turn permanently from UHF television to other opportunities if CATV activity jeopardized UHF prospects in otherwise attractive markets. Since "the next few years will supply the critical answer to whether the congres-

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[51] About one-third of the UHF stations now in operation did not exist five years ago and losses are frequent among new stations. See n. 15 *supra;* TV Digest, Television Factbook No. 37, at 52-a (1967).

sional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved" (A. 47), interim relief is doubly essential.

The Commission's resolve to delay hazardous CATV expansion pending a hearing is consonant with "the basic thrust of congressional policy in the Communications Act" to determine "important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop" (A. 57-58). For example, section 319, 47 U.S.C. § 319 (1964), prohibiting issuance of a station license unless a construction permit is first secured, is declared by the Congress to reflect an intent to keep the Commission "free from the pressure which otherwise might be exerted by an applicant for a radio-station license who has made considerable expenditures towards construction of a station . . . ."[52]

The Second Report and Order applies this precept of preserving the status quo throughout the CATV regulations and in an evenhanded fashion. There is an automatic stay by rule of importation of non-Grade B signals into the Grade A contour of a station in the top 100 markets until the Commission has held an evidentiary hearing on the public interest or determined that a waiver of this requirement should be granted. 47 C.F.R. § 74.1107(a) (1967). In all other situations the burden is on the television station to seek relief against importation of outside signals.[53] 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967). But if such relief is sought within 30 days after notice is given by the CATV system of its intentions, there is an automatic stay under the rules

[52]H.R. Rep. No. 417, 83rd Cong., 1st Sess. 1-2 (1953). Similarly, sections 301 and 309 require decision on public interest questions before broadcasting stations can begin operations. 47 U.S.C. §§ 301, 309 (1964).

[53]These include the transmission of distant signals into the area between the Grade A and Grade B contours of a top 100-market station or anywhere within the service area of a station in a market below the top 100 as well as special "overlapping market" situations.

until the Commission has acted on the petition. 47 C.F.R. § 74.1105 (1967). On the other hand, although the rule requiring carriage of local stations applies to all CATV systems, a system may petition for waiver of this requirement and it need not comply with the rule until the Commission acts on its petition. 47 C.F.R. § 74.1109(h) (1967). The grandfather clause, allowing existing CATV systems to continue regardless of harm, bespeaks the same recognition that a *fait accompli* cannot gently be undone. See n. 56 *infra*. The very policy that permits respondents to continue established operations now and to expand in settled geographic areas is the premise of the temporary order they so vigorously attack.

It is apparent, moreover, especially in connection with the implementation of the distant signal and related rules and policies, that the concept of stays to maintain the status quo until the Commission can determine what course of action to follow in a particular situation is fundamental to the basic system of regulation adopted by the Commission. It would be fruitless for the Commission to contemplate, as it has, detailed inquiry to determine if particular CATV plans to import outside signals would be consistent with the establishment and healthy maintenance of television broadcast service in the area if the status quo could not be maintained while the Commission was determining what the public interest required. The necessity for this power is the same whether such inquiry is the result of a petition by a CATV system for a hearing or for a waiver of a hearing or whether, as here, the burden is on the television station to seek relief. The power to maintain the status quo is equally critical to the Commission's CATV regulatory scheme whether that power is exercised by a specific order as here or by the operation of the provisions of its rules which result in automatic stays.

The Commission's memorandum opinion and order instituting the present case is no less eloquent than the Second Report and Order in portraying the "necessity" for a tem-

porary stay, lest the hearing itself and the statutory policies it serves be frustrated. The Commission found that San Diego was a major market receiving multiple television service from existing San Diego stations and was the center of promising UHF activity. (A. 148-49). Respondents' CATV systems, importing signals of six to nine Los Angeles stations located a hundred miles away, were duplicating the great bulk of the San Diego stations' nonlocal programming while splintering the audience base among more than twice the allocated number of stations (A. 149).[54]

These systems had not yet captured the community, several being only a few months old (A. 149). But their recent activity and their wide franchises foreshadowed their massive potential,[55] and fully justified the Commission's conclusion in the memorandum opinion and order instituting the San Diego hearing and issuing the stay:

> "[U]nless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (A. 163).[56]

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[54] Figures cited by the Commission indicated "that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents" (A. 150).

[55] To repeat, CATV cable lines existed in portions of communities with 294,000 of the homes (78 percent) within Midwest's Grade A contour, and CATV franchises covered 90 percent of the homes in the contour (A. 162-63).

[56] In rejecting proposals that grandfather rights be allowed only to signals being transmitted in April 1965, when the rulemaking was

A temporary directive so well warranted by the aims of a statute, directed at its express objects of regulation, and creating no conflict with any of its terms is justified by the language of sections 4(i) and 303(r), especially when construed in accord with principles and precedents already discussed. See pp. 27-30 *supra*. It bears repeating that this Court has never hesitated to find that "necessary rule-making power" is "coterminous with the scope of agency regulation itself," *American Trucking Associations* v. *United States*, 344 U.S. 298, 311 (1953), and that this principle applies with special force to a Commission "established" "to maintain . . . a grip on the dynamic aspects of radio transmission" whose power, "in recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting," must be measured by the "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[57]

Decisions in both the Tenth and District of Columbia Circuits uphold agency power to take exigent temporary action under broad rulemaking authority. The Tenth Circuit decision is *Amerada Petroleum Corp.* v. *FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976 (1962), sustaining the Federal Power Commission's temporary restraint on the filing of a new gas rate schedule while a previous one

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first noticed, the Commission stated: "The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated" (A. 101).

[57]Upholding the Commission's restriction on multiple ownership of broadcast licenses, this Court acknowledged that the challenged rules contained limitations "not specifically authorized by statute" but refused to limit the Commission's rulemaking authority to such specifics since sections 4(i) and 303(r) "grant general rulemaking power not inconsistent with the Act or law." United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956).

was under investigation. The Natural Gas Act contains no explicit grant of such a power of indefinite delay; on the contrary, it expressly provides that the Commission may suspend rate increases for a *maximum* period of five months, implicitly indicating a congressional policy against suspensions unbounded in time. Section 4(e), 15 U.S.C. § 717c(e) (1964). The Court in sustaining the controverted power relied importantly on the grant in section 16 of the Act of authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as [the FPC] may find necessary or appropriate to carry out [the Act's] provisions," 15 U.S.C. § 717*o* (1964), language strikingly like section 4(i) of the Communications Act. See p. 39 *supra*.

The District of Columbia Circuit followed the same course of approving temporary action not authorized in specific terms in *R.A. Holman & Co.* v. *SEC*, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962).[58] There, the court sustained the power of the Securities and Exchange Commission to suspend summarily a broker-dealer's privilege to underwrite exempted securities pending a hearing on charges against him, taking note of Commission's "broad rule-making powers." 229 F.2d at 132. This stay summarily deprived the broker-dealer of a portion of his existing business, while the FCC order challenged here merely stays expansion of the CATV systems in certain respects and was issued only after notice and submission of written statements, affidavits and documents by both sides.[59]

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[58] Other District of Columbia cases following *Holman's* liberal approach include Public Serv. Comm'n v. FPC, 327 F.2d 893 (1964) (Natural Gas Act), and Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (1967) (Federal Power Act).

[59] In its brief in opposition to certiorari, Southwestern sought to distinguish *Holman* on the ground that the power had been "contemplated" by the Congress (p. 22, n.17). On the contrary, a House and a Senate Report merely took note of the SEC regulation later contested in *Holman* without expressing approval or disapproval while "Con-

Against these cases supporting a liberal construction of rulemaking provisions, affirming their substantive scope, and applying them in aid of temporary restraints, the respondents have pressed two District of Columbia decisions, *Trans-Pacific Freight Conf. of Japan* v. *FMB*, 302 F.2d 875 (1962), and *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (1949). Neither was cited by the Ninth Circuit in its opinion and neither is in point. Both cases involved agency orders which in effect suspended authority previously granted by them and essential or integral to the on-going business of the private parties.[60] That special procedural treatment may be afforded the withdrawal by an agency of authority previously granted by that agency and relied upon by the private party, *e.g.*, section 316, 47 U.S.C. § 316 (1964), has no bearing on the present case. The Commission never authorized the CATV systems. They proceeded at their own risk in the face of warnings from the Commission. See p. 8 *supra*. Moreover, the order here was directed against future expansion; it did not affect existing operations.

In addition, both cases treated the problems before them in the specific context of particular interim orders sought to be premised on particular statutes. Neither opinion purports to lay down a rule governing all configurations of facts and authority, nor does it appear that in either the court saw a significant public interest consideration favoring the stay or dealt with a provision like section 4(i) as a source of authority. Even on their own facts both decisions have been undermined by later authority at least in part: *Trans-Pacific*, which

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gress" never considered it at all. Mission's opposition argued that the court in *Holman* did not pass upon the SEC's statutory power (p. 15), but the court referred to the Commission's broad rulemaking authority and it is inconceivable that it would have upheld the Commission if it had any doubt about the Commission's power.

[60] In *Trans-Pacific*, the Commission sought to restrain a fine levied under authority of a shipping conference agreement previously approved by the agency, while in *Standard Airlines* an airline "letter of registration" was at issue.

relied heavily on prior agency practice, by Supreme Court decisions rejecting that emphasis, see n. 38 *supra*, and *Standard Airlines*, by decisions limiting the need for hearings.[61]

There is, finally, nothing to the suggestion that a temporary stay from a court under *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), would be an adequate and appropriate substitute for FCC interim action. The appraisal of mergers such as that involved in *Dean Foods* is a function normally performed by courts. At the same time the number of stays sought by the FTC is unlikely to be so vast as to clog the judicial docket. By contrast, the FCC is best suited to make the initial expert judgment required in considering whether the public interest warrants staying CATV expansion, and the Commission's opinion in this case reveals the wealth of technical considerations involved (A. 146). The number of CATV systems likely to demand court proceedings would also heavily burden both the Commission and the courts.

For the FTC, court-granted interim relief may be the suitable course. That agency lacks the broad statutory powers of the FCC, does not have the far-reaching implementing power of section 4(i) of the Communications Act, and shares primary responsibility for merger matters with the courts and Department of Justice. The FCC, however, has basic responsibility for radio and television, consonantly broad authority, and a demonstrated need to grant the relief at issue while carrying out its exclusive function of framing permanent public-interest limitations on San Diego CATV television signal carriage.

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[61] *Standard Airlines* was distinguished by the court in *Holman* on its facts as involving "different competing interests," 299 F.2d at 132 n.9, but *Holman* plainly represents a change in approach. *Standard Airlines* relied in part upon WJR v. FCC, 174 F.2d 226 (D.C. Cir. 1948), which was subsequently overruled by this Court, 337 U.S. 265 (1949). See also American Broadcasting Co. v. FCC, 179 F.2d 437 (D.C. Cir. 1949).

B. *Adequacy of Procedure*

Not merely is the Commission's power to impose a temporary stay on CATV expansion firmly grounded in statute and precedent but it has been exercised through procedures both fair to respondents and adequate under the law.

Respondents had a timely opportunity to present their views to the Commission. The petition which commenced these proceedings was filed with the Commission on March 17, 1966. Respondents had an entire month to prepare oppositions and took full advantage of it; on April 18, 1966, the Mission group of respondents, n. 21 *supra*, filed a 28-page opposition together with forty pages of attachments containing charts, affidavits, and similar data. The fourth respondent, Southwestern Cable Co., submitted three substantive documents, a brief in opposition, a motion to dismiss and a statement of position, along with quantities of supporting material. Midwest's responsive papers followed promptly within the next 20 days.[62] This procedure is spelled out in the CATV rules, 47 C.F.R. § 74.1109 (1967), and affords important protections not allowed by the SEC in *Homan* and not found essential by the reviewing court in that case.

On July 20, 1966, the Commission adopted its memorandum opinion and order of almost 30 pages giving careful consideration to the contentions and arguments of each side. The opinion considers not only the factual contentions of all parties and its own controlling policies, but deals specifically with objections to temporary relief framed by the respondents. The order itself carefully reserves to respondents power to continue and expand carriage of San Diego area signals and to continue present carriage of Los Angeles signals and to expand within specified geographical areas containing "substantial numbers of potential new subscribers" (A. 171).

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[62]The assortment of pleadings require half a page of footnote space in the Commission's decision merely to catalogue (A. 147 n.1). All the papers are on file with the Clerk of this Court.

The Commission did not hold an evidentiary hearing, nor do its rules require one. 47 C.F.R. § 74.1109 (1967). The very aim of its procedure is to ascertain whether a full-scale hearing is warranted and whether interim relief is needed during its course. The appraisal on which permanent relief must turn demands a thorough inquiry into difficult and elusive problems, technical, economic, and even sociological in kind, and consideration of elaborate data (A. 58). The hearing process alone in the present case involved an enormous volume of exhibits and consumed 28 days of hearing and a great many hearing conferences over the course of eight months, although the case had been handled on an expedited basis. The briefing is currently underway for review by the Commission of its examiner's report and oral argument is still to come. As the Commission found in issuing its temporary stay, the public interest did not allow the dangers of CATV expansion to go unchecked during this interval.

Despite these compelling circumstances, respondents contended below that section 312(b) of the Act did not permit a temporary order to be issued without a hearing. 47 U.S.C. § 312(b) (1964). That section provides that the Commission may issue a cease-and-desist order against any person who violates the terms of his license, any provision of the Act or any regulation of the Commission. Under section 312(c), the procedure for issuing a cease-and-desist order includes service of a show cause order, thirty days' notice, a hearing and a statement of Commission findings and reasons served on the person involved if the order issues.[63] 47 U.S.C. § 312(c) (1964).

The short answer to respondents' argument is that section 312 was not violated because it did not apply. The Commission did not act under authority of that section but under sections 4(i) and 303(r), whose capacity to support the Com-

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[63] The hearing aside, respondents did in fact receive the substance of these requirements: notice, thirty days to respond, and an opinion.

mission order has already been demonstrated. Moreover, section 312(b) was not intended to apply here. Respondents held no license and have never been accused of violating any statute, rule, or license term, the only conditions in which a cease-and-desist order is authorized. Indeed, had the Commission's directive been issued under section 312(b), respondents could not have sought review in the Ninth Circuit. Review of cease-and-desist orders is confined to the District of Columbia Circuit under section 402(b) of the Communications Act, 47 U.S.C. § 402(b) (1964).

Nor does the Commission's order in this case offend the underlying policy or rationale of section 312 for that section contemplated an entirely different type of order addressed to an entirely different class of problems. A cease-and-desist order is a permanent decree properly issued after the question has been thrashed out completely and designed to terminate the controversy. The Commission's order here is merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required.[64]

The very nature of the CATV rules makes it both ironic and pointless to insist that there should have been an evidentiary hearing before the Commission issued its order. As already noted, the Commission was urged when it was framing its CATV rules to impose a blanket ban on CATV expansion in situations like that below; indeed the Los Angeles-San Diego problem was a specific and prime example of the need for effective rules (A. 18-19, 48-50, 68-69). Had such a ban been promulgated, respondents would have

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[64] Thus, there is nothing to respondents' rhetorical complaint that they, who have broken no regulations, are denied the section 312 hearing accorded to a violator of the CATV rules. In the latter case the question is what the violator was doing; clear enough in the present case, and, except in the most unusual circumstances, the violator has no right to a hearing on whether the public interest requires the order, the essential question here and on which full opportunity for written submissions was allowed.

automatically been prevented from expanding the importation of Los Angeles stations without being afforded the right to make any written presentation, let alone any evidentiary hearing under section 312. Having secured less stringent limitations, respondents now claim to be entitled to greater rights. To require a hearing in cases such as this could well force the Commission to rewrite its rules to impose an automatic ban on expansion of existing systems until the public interest question is resolved.

What is more, it is difficult to imagine what function a hearing would have served given the substantive standards for granting the order at issue, standards that are not controlled by section 312 or its rationale. The Commission has made evident in the Second Report and Order and the opinion in this case its resolve to prevent serious CATV penetration into a major market at the risk of injury to UHF television until the Commission could "explore in depth the details" of the proposed CATV expansion, market studies, local television, pay-TV potential, and other important facets (A. 58).

The papers submitted to the Commission before it issued the order under review established beyond dispute that San Diego was a major market with considerable off-the-air local service, that it was a center of present and potential UHF activity, that respondents were transmitting Los Angeles signals and that their franchises and existing lines demarcated large areas for potential expansion. Claims of irreparable injury advanced by respondents were judged inadequate as a matter of law assuming the truth of the facts asserted (A. 167-69).[65] The boundaries of concentrated CATV service by respondents on the grandfather date, and the temporary limits for expanding carriage of Los Angeles signals were not sub-

[65] Nevertheless the order left it open for respondents to reapply at any time "if some form of irreparable injury not here shown or anticipated should develop . . ." (A. 169).

stantially challenged by respondents.[66] Consequently, the facts necessary to interim relief were basically undisputed and a further hearing on temporary relief would have served only to probe issues not controlling temporary relief but reserved for the evidentiary proceeding to decide on permanent limitations.

Oral presentations are not a requisite to temporary relief as a general matter. Any attempt to read *Standard Airlines* so broadly squarely conflicts with the same court's later decision in *Holman*, 299 F.2d at 127, and this Court's decision in *FCC* v. *WJR*, 337 U.S. 265 (1949), affirming that an oral hearing is not required even for a final order.[67] Given the need for prompt action by the Commission and the opportunity granted respondents to raise and document any contentions they wished, the procedures followed were correct and denied respondents no rights.

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[66] In the one geographic area where the parties differed as to boundaries, the Commission accepted respondents' position for purposes of the order, leaving it open to petitioners to pursue the matter with further proof if they wished (A. 170-71).

[67] See also Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941); Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945); American Broadcasting Co. v. FCC, 179 F.2d 437, 442 (D.C. Cir. 1949).

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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